Taisei Corp v Doo Ree Engineering & Trading Pte Ltd
[2009] SGHC 156

Case Number : OS 388/2009

Decision Date : 03 July 2009

Tribunal/Court : High Court

Coram : Francis Ng Yong Kiat AR

Counsel Name(s) : Thio Ying Ying and Tan Yeow Hiang (Kelvin Chia Partnership) for the plaintiff; Monica Neo (TSMP Law Corporation) for the defendant

Parties : Taisei Corp — Doo Ree Engineering & Trading Pte Ltd

Administrative Law

Building and Construction Law

Statutory Interpretation

3 July 2009

Francis Ng Yong Kiat:

Introduction

1 These proceedings involved an application by the plaintiff, Taisei Corporation ("Taisei"), to set aside the adjudication determination in SOP Application No. SOP/AA88 of 2008 pursuant to section 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B) ("the SOP Act").

2 I allowed the application and ordered that the adjudication determination be set aside. As there are few locally reported decisions on the scope of the court's powers in dealing with applications under the SOP Act to set aside adjudication determinations, I have decided to set out my grounds of decision.

The undisputed facts

3 The undisputed background facts leading up to the present application can be summarised briefly.

4 Taisei had been appointed as the main contractor by the Land Transport Authority ("LTA") to construct the Thomson, Botanic Gardens and Farrer Road Mass Rapid Transit ("MRT") Stations. Taisei, in turn, appointed the defendant in these proceedings, Doo Ree Engineering & Trading Ltd ("Doo Ree"), as its sub-contractor to carry out reinforced concrete works for the Botanic Gardens MRT Station ("the Botanic Gardens Station project").

5 Taisei appointed Doo Ree as its sub-contractor by way of a 4-page Letter of Award ("LOA") dated 7 November 2006, a draft of which was forwarded to Doo Ree for consideration on or about 18 November 2006. The LOA was eventually signed by representatives of Taisei and Doo Ree on or about 21 December 2006 together with another 6-page document called the "Scope of Provision of Preliminaries between the Main Contractor and Sub-Contractor".

6 On 4 October 2008, Taisei terminated Doo Ree's appointment as its sub-contractor for the Botanic Gardens Station project.

7 On 29 November 2008, Doo Ree submitted its 25th payment claim for the Botanic Gardens Station project, totalling $1,194,593.29, to Taisei.

8 On 16 December 2008, Doo Ree gave notice to Taisei of its intention to apply for adjudication; thereafter, on 19 December 2008, Doo Ree lodged an adjudication application with the Singapore Mediation Centre ("SMC") and served a copy of the application on Taisei. On 20 December 2008, Taisei responded by letter to Doo Ree's notice of 16 December 2008 and also enclosed a payment response (agreed by parties to have been in the proper form) which indicated that Taisei was not prepared to pay Doo Ree any part of its claim because of various charges claimed by Taisei against Doo Ree.

9 The adjudication subsequently commenced on 31 December 2008 and was conducted by Mr Tan Cheow Hin, an adjudicator appointed by the SMC. At the outset of the adjudication proceedings, Taisei raised four points of objection to Doo Ree's adjudication application. These are summarised at paragraph 25 of the adjudication determination as follows:

> (i) the Adjudication Application is premature because it was made before expiry of the time allowed for a payment response;
>
> (ii) the adjudication application failed to comply with the requirements prescribed by the Building and Construction Industry Security of Payment Regulations 2005 ("Regulations");
>
> (iii) the Adjudication Application is premised on a flawed payment claim;
>
> (iv) the Adjudication Application must be set off against the back-charges of $827,355.68, and $607,567.02 …

10 The adjudicator found against Taisei on the first three points, which he considered to be related to his jurisdiction, and proceeded to consider the substantive merits of the adjudication.

11 An adjudication determination was made on 3 February 2009 and was subsequently amended on 5 February 2009 (the amendments are not of consequence to this matter). The adjudication determination recorded that Doo Ree had succeeded in its claim to the extent of $444,503.18.

12 Following the adjudication determination, Taisei did not pay Doo Ree the adjudicated amount and did not apply for adjudication review. On 1 April 2009, Taisei commenced the present proceedings to set aside the adjudication determination.

The substantive issue in the originating summons

13 Based on Taisei's submissions, the substantive issue for the court to determine in the present proceedings was whether the adjudication application was premature such that the adjudicator had no jurisdiction to make an adjudication determination. The answer to this question in turn depended on whether Clause 16.3 in a document described in the first affidavit of Taisei's Contract Manager, Mr Lee Chin Lim ("Mr Lee"), as a "sub-contract agreement" was binding on the parties. This document, which I shall refer to hereafter as "the draft sub-contract", comprised 128 pages and, apart from a cover page and contents page, was divided into four main sections, namely, the "Sub-contract Agreement", the "Conditions of Sub-contract", the Schedules and the Appendices.

14 The aforementioned Clause 16.3 was one of the provisions in the "Conditions of Sub-contract" section of the draft sub-contract and will be referred to hereafter simply as "**Clause 16.3**". The portion of Clause 16.3 that is material for purposes of the present proceedings reads as follows:

> Clause 16.3
>
> Payment Due; Payment Withheld or Deferred; Interest
>
> The Contractor shall respond to the payment claim submitted by the Sub-Contractor within 21 days after the payment claim is served.

1 5 *The adjudicator found that Clause 16.3 was not binding on the parties*. Before me, Taisei contended that the adjudicator had erred and that Clause 16.3 formed part of the terms of the sub-contract between the parties, whereas Doo Ree contended that this provision was not binding on the parties. Whether Clause 16.3 was binding on the parties was, in view of sections 11(1), 12(2) and 13(3)(a) of the SOP Act, of significance in determining the period within which an within which an adjudication application can be made. Sections 11(1), 12(2) and 13(3)(a) of the SOP Act provide:

> **Payment responses, etc**.
>
> **11**.—(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (a) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
>
> (b) where the construction contract does not contain such provision, within 7 days after the payment claim is served under section 10.
>
> **Entitlement to make adjudication applications**
>
> **12**.—(1) …
>
> (2) Where, in relation to a construction contract —
>
> (a) the claimant disputes a payment response provided by the respondent; or
>
> (b) the respondent fails to provide a payment response to the claimant by the date or within the period referred to in section 11 (1),
>
> the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.
>
> **Adjudication applications**
>
> **13. —(1) …**
>
> **(3) An adjudication application —**

(a) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;

The "dispute settlement period" referred to in section 12(2) of the SOP Act is the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11(1) of the SOP Act: section 12(5) of the SOP Act.

16 The consequences of *non-compliance* with section 13(3)(a) of the SOP Act are spelt out in section 16(2)(a) of the SOP Act which provides

Commencement of adjudication and adjudication procedures

16. —(1) …

(2) An adjudicator shall reject —

(a) any adjudication application that is not made in accordance with section 13 (3) (*a*), (*b*) or (*c*);

17 Accordingly, as both parties agreed, *if* Clause 16.3 *was binding* on the parties:

(a) section 11(1)(a) of the SOP Act would apply and Taisei's payment response of 20 December 2008 would have been provided within the 21-day time limit specified therein (the last day of this period being 22 December 2008, factoring in Hari Raya Haji on 8 December 2008 and the provisions of the Interpretation Act (Cap 1) on computation of time);

(b) the last day of the 7-day dispute settlement period would have fallen on 30 December 2008 (factoring in Christmas Day on 25 December 2008);

(c) Doo Ree would have been entitled to make an adjudication application within the next 7 days (i.e. from 31 December 2008 to 7 January 2009, factoring in New Year's Day on 1 January 2009) by virtue of section 13(3)(a) of the SOP Act;

(d) Doo Ree's adjudication application of 19 December 2008 would therefore have been premature and *not made in accordance* with section 13(3)(a) of the SOP Act; and

(e) the adjudicator ought to have rejected the adjudication application pursuant to section 16(2)(a) of the SOP Act.

18 On the other hand, *if* Clause 16.3 *was not binding* on the parties:

(a) section 11(1)(b) of the SOP Act would apply since there was no other contractual provision specifying when the payment response should be provided;

(b) Taisei's payment response of 20 December 2008 would have been provided after the expiry of both the 7-day time limit specified in section 11(1)(b) (on 6 December 2008, i.e. 7 days after 29 November 2008) as well as the 7-day dispute settlement period following thereafter (on 15 December 2008, factoring in Hari Raya Haji on 8 December 2008 and the provisions of the Interpretation Act (Cap 1) on computation of time);

(c) Doo Ree would have been entitled to make an adjudication application within the next 7

days (i.e. from 16 – 22 December 2008);

(d) Doo Ree's adjudication application of 19 December 2008 would therefore have been *made in accordance* with section 13(3)(a) of the SOP Act; and

(e) there would have been no grounds for the adjudicator to reject the adjudication application pursuant to section 16(2)(a) of the SOP Act.

19 It should be noted that the substantive issue as framed by Taisei was essentially identical to the first objection that had been raised before the adjudicator which, as mentioned at [10] above, was dismissed.

Preliminary issue: the scope of an application to set aside an adjudication determination

20 Although section 27(5) of the SOP Act does not set out the scope of a court's powers when hearing an application to set aside an adjudication determination or state when a court may do so, both parties agreed that it was not open a court hearing such an application to review the substantive merits of the adjudication determination. The parties agreed that the court could only consider issues pertaining to the adjudicator's jurisdiction or natural justice. However, they were divided on the specific issue of whether this court could examine and set aside the adjudication determination even if the adjudicator had erred in finding that Clause 16.3 did not bind the parties and that the adjudication application had been made within the time prescribed under the SOP Act.

The parties' positions

21 Counsel for Taisei, referring to *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 ("*Brodyn*"), submitted that sections 11(1)(a), 12(2) and 13(3)(a) of the SOP Act were "essential pre-conditions for the existence of the adjudicator's determination" such that if Doo Ree had breached these provisions, the adjudicator would have lacked jurisdiction to make an adjudication determination and his adjudication determination would therefore be void and be liable to be set aside. For completeness, I should also mention that while counsel also made the submission, at this juncture of the proceedings, that the adjudicator's consequential failure to consider Taisei's adjudication response resulted in a breach of natural justice which this court could also consider, this argument was not developed any further in the course of the hearing.

22 On the other hand, counsel for Doo Ree adopted the position that an error of fact or law on the part of an adjudicator as to what constituted the valid and operative terms of a contract would not prevent a determination from being an adjudication determination within the meaning of the SOP Act and would also not prevent such a determination from being enforced. As such, counsel argued that even if the adjudicator erred in finding that Clause 16.3 was not incorporated into the sub-contract, this was not an error that would prevent his determination from being an adjudication determination within the meaning of the SOP Act because this was merely an error as to the interpretation of the sub-contract between the parties.

23 Counsel for Doo Ree relied on two authorities for the above proposition, namely, *C & B Scene Concept Design Ltd v Isobars Ltd* [2002] BLR 93 ("*C & B Scene Concept Design*"), a decision of the English Court of Appeal, and *The Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 ("*Contrax Plumbing*"), a decision of the Supreme Court of New South Wales.

24 *C & B Scene Concept Design* involved an appeal brought by a claimant against the dismissal of

its application for summary judgment to enforce an adjudication decision in its favour. The claimant had commenced the adjudication based on its entitlement to payment from the employer company of three interim applications for payment arising under a standard form design and build contract. The adjudicator found for the claimant on the basis that the employer had failed to give written notice to the claimant within five days of the receipt of the applications and thereby became liable to pay the claimant the sums claimed in the interim applications by virtue of the operation of a particular provision in the contract. Subsequently, the employer successfully challenged the claimant's application for summary judgment on, *inter alia*, the basis that the relevant terms were in fact not part of the contract and the employer was thus not liable to pay the claimant. The recorder before whom the summary judgment proceedings were conducted held that the adjudicator had based his decision on a contractual provision that did not apply to the agreement between the parties and his conduct in considering the provision was "in excess of jurisdiction".

25 The Court of Appeal allowed the claimant's appeal against the recorder's decision, holding that the adjudicator's jurisdiction was determined by and was derived from the dispute referred to him; the scope of the dispute had been agreed by the claimant and the employer as the obligation to make and receive payment following the applications for interim payment. Although the adjudicator, in determining this dispute, had to resolve whether the provision applied, his jurisdiction was not affected even if he decided this issue wrongly. In the present case, there was an agreement between the employer and claimant as to the scope of the dispute and although the adjudicator might have made errors of law as to the relevant contractual provision, his decision was still binding and enforceable.

26 In *Contrax Plumbing*, the claimant entered into a contract with the Minister for certain works to be carried out at a hospital. The claimant later submitted a payment claim under the New South Wales Building and Construction Industry Security of Payment Act 1999 ("the NSW Act") to the Minister who issued a payment schedule (equivalent to a payment response under the SOP Act) indicating that no payment was proposed because of the operation of certain terms in the contract. The claimant subsequently commenced adjudication proceedings under the Act and the adjudicator found for the claimant, holding that the terms relied on by the Minister were void by virtue of section 34 of the NSW Act ("section 34").

27 The Minister later filed a summons seeking to vitiate the adjudication determination on the basis that the adjudicator had, *inter alia*, made an error of law in the construction of section 34. On this issue, the primary judge who heard and dismissed the summons held that pursuant to section 34, the terms relied on by the Minister were void. The Minister took the same point up on appeal before the Court of Appeal of New South Wales. In dismissing the appeal, the court held that "an error of fact or law, including an error in interpretation of [the NSW Act] or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of [the NSW Act]". Accordingly, it was held that even if section 34 did not invalidate the terms (contrary to what the adjudicator and the primary judge found), the adjudicator's determination would not be invalid and it was thus unnecessary for the court to express a final view as to whether section 34 had that effect.

28 I found *C & B Scene Concept Design* and *Contrax Plumbing* to be distinguishable from the instant case. In both cases, the question of whether the disputed terms were part of the relevant contracts was not expressed to affect the issue of whether the adjudicator could have proceeded to determine the dispute between the parties to begin with. In other words*, it was never contended in those cases that the adjudicators lacked jurisdiction to make an adjudication determination because of the particular terms of the contracts*. What was stated in *Contrax Plumbing* (see [25] above) must thus be understood in its proper context and I was of the view that it did not amount to a

blanket proposition that an error in interpreting the terms of a contract could *never* prevent a determination from being an adjudicator's determination.

The New South Wales Supreme Court decisions involving adjudication applications made without complying with statutory timelines

29 While the two cases cited by Doo Ree did not advance its position, four other decisions of the New South Wales Supreme Court, *Multipower v S & H Electrics* [2006] NSWSC 757 ("*Multipower*"), *JAR Developments Pty Ltd v Castleplex Pty Ltd* [2007] NSWSC 737 ("*JAR Developments*"), *Firedam Civil Engineering v KJP Construction* [2007] NSWSC 1162 ("*Firedam*") and *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd* [2007] NSWSC 554 ("*Kell & Rigby*") were of relevance to consideration of the preliminary issue. Before I proceed to discuss these cases, I note that our courts have, in interpreting the provisions of the SOP Act, relied on decisions from the courts of New South Wales interpreting the provisions of the NSW Act: see *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364; *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 ("*Chip Hup Hup Kee*"). This approach has been justified based on the legislative origins of the SOP Act though it is also important to bear in mind that there are differences between the legislative schemes set out in both statutes.

30 Both *Multipower* and *JAR Developments* appeared to support Doo Ree's contention that even if an adjudicator erred in finding that an adjudication application had complied with statutory timelines, this would not be a basis for a court to declare the adjudication determination to be void. In *Multipower*, the plaintiff, a head contractor brought a summons seeking to have an adjudication determination in favour of the defendant sub-contractor declared void on the basis that the adjudication application was made out of time and the adjudication determination was hence made without jurisdiction. It was contended by the plaintiff that the adjudicator had erred in interpreting the sub-contract between the parties and made an erroneous finding as to the due date for making payment pursuant to a payment claim by the defendant. According to the plaintiff, this was significant because the period within which an adjudication application could be made was calculated with reference to the due date pursuant to section 17(3) of the NSW Act. Based on what the plaintiff asserted was the correct due date, the adjudication application had been brought out of time. McDougall J, applying *Brodyn*, dismissed the plaintiff's summons, holding that failure to comply with the relevant time limit arising out of section 17(3) of the NSW Act did not vitiate a determination on the ground of failure to comply with a basic and essential precondition of validity. He noted that even if the adjudicator had erred in finding that the adjudication application had been made within time, there would merely have been an error within the scope of jurisdiction entrusted to adjudicators and this would have been a mistake that the adjudicator would have been entitled to make.

31 In *JAR Developments*, the defendant made a payment claim against the plaintiff, who served a payment schedule on the defendant. The defendant then proceeded to make an adjudication application but did so outside the time limit prescribed by the NSW Act for doing so (which was calculated from the date of receipt of the payment schedule). The adjudicator made an erroneous finding as to when the date of receipt occurred and hence concluded that the adjudication application had been validly made. The plaintiff later sought to set aside the judgment that had been obtained pursuant to the adjudication determination made by the adjudicator on the basis that the adjudication was a nullity. Rein J dismissed the plaintiff's notice of motion, deciding to follow *Multipower* and holding that a consideration of *Brodyn* showed that an adjudication in which the adjudicator erroneously but bona fide and in accordance with the rules of natural justice determined that a requisite time limit had been met would not be considered void.

32 However, the court in *Firedam* declined to reach a similar conclusion as in the preceding two

cases. In this case the plaintiff challenged the validity of an adjudication determination, *inter alia*, on the ground the adjudicator had incorrectly determined that the adjudication application had been lodged within the statutorily prescribed time limit because of an error in determining when the claimant had received the payment schedule from the plaintiff. Although Austin J found that the adjudicator had erred and had considered the adjudication application in breach of the time limits under section 17(3) of the NSW Act, he eventually considered that it was unnecessary for him to reach a conclusion on the issue of whether section 17(3) of the NSW Act and the timelines prescribed therein was "one of the basic and essential requirements for a valid determination", such that non-compliance rendered the adjudication void. On the facts of the case, Austin J felt that there was another applicable ground of review raised by the plaintiff, namely that of natural justice and while he ultimately found for the plaintiff on this ground, he expressly left open the question whether an adjudicator's determination was void if the adjudication application was made out of time, noting that *Brodyn* had also left this question open.

33 Finally, in *Kell & Rigby*, the plaintiff served a payment claim on the defendant who provided a payment schedule to the plaintiff late. The plaintiff accordingly became entitled to make an adjudication application provided it first gave notice to the defendant of its intention to apply for adjudication (section 17(2)(a) of the NSW Act states that an adjudication application "cannot be made" unless the requisite notice is given). However, the plaintiff proceeded to make an adjudication application without first having notified the defendant. The appointed adjudicator was made aware by the defendant of the plaintiff's omission and declined to proceed with the adjudication. The plaintiff then commenced proceedings to enter judgment and the defendant contended that the plaintiff was not entitled to enter judgment, having elected to pursue the option of adjudication. Bergin J held that *the adjudication application was a nullity because of the failure to perform the mandatory condition* imposed by section 17(2)(a) of the NSW Act and the plaintiff was thus entitled to enter judgment as no election to proceed by adjudication had been made.

The court's conclusions on the preliminary issue

34 Both *Firedam* and *Kell & Rigby* thus appear to throw the holdings in *Multipower* and *JAR Developments* into some doubt. While *Kell & Rigby* was recognised in *JAR Developments* as authority for the proposition that failure to adhere to time constraints set out in the NSW SOP Act 1999 would render an adjudication application void, Rein J felt that *Kell & Rigby* dealt with consequences where failure to meet the time limits imposed by the NSW SOP Act 1999 was established *at the adjudication*, whereas *Brodyn* dealt with the question of the effect of an erroneous determination by an adjudicator that time limits had been met (i.e. where the error was only discovered later by the court).

35 The effect of the New South Wales decisions cited above seems to be that when the non-compliance is detected is material. On the one hand, if the non-compliance is detected by the adjudicator before he has reached a determination, the entire application is a nullity; however, if the non-compliance is only subsequently established before a court considering an application to set aside the adjudication determination, this does not render the adjudication determination void.

36 It is questionable whether *Brodyn* sought to draw such a distinction. While *Brodyn* was indeed a case involving a review of an adjudication determination by a court, Hodgson JA, delivering the decision of the New South Wales Court of Appeal, did not distinguish between non-compliance with essential statutory pre-conditions that is identified up by an adjudicator and similar non-compliance that is only discovered by a reviewing court. What he actually stated was as follows:

> 52 … [I]t is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions

laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1 The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).

2 The service by the claimant on the respondent of a payment claim (s.13).

3 The making of an adjudication application by the claimant to an authorised nominating authority (s.17).

4 The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).

5 The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to *ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination*.

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination …*What was intended to be essential was compliance with the basic*, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power …, and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, *be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination*. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will

not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.

[emphasis added]

37 Following from the above, the appropriate question that should be asked is whether our legislature decided, when enacting the SOP Act, that the timelines for making an adjudication application should be essential to the existence of an adjudication determination. With respect, I am of the view that the distinction drawn in JAR Developments is somewhat fine. If an adjudication application is a nullity because of non-compliance with a mandatory time limit prescribed in the statute, it is difficult to see why identical non-compliance would not make an adjudication determination, reached because an adjudicator erroneously thought there was compliance, a nullity as well. I am not bound to follow the approach of the New South Wales courts and I am of the view that if the answer to the above question is in the affirmative, it would be open to a court to review an adjudication determination to determine if there was compliance with these timelines and set aside the adjudication determination as being void in the event of non-compliance.

38 While the New South Wales Court of Appeal in *Brodyn* did not express a conclusive view on whether timelines for making an adjudication application under the NSW Act were essential to the existence of an adjudication determination, it is important to appreciate that *differences* exist between the legislative scheme under the SOP Act and the NSW Act. The requirements to make adjudication applications within the prescribed time frames in both pieces of legislation are couched in mandatory language but the SOP Act goes one step further than the NSW Act by *expressly prescribing* under section 16(2)(a) what an adjudicator must do if an adjudication application is not made in accordance with sections 13(3)(a) – (c) of the SOP Act: *reject the adjudication application*. In such a situation, the adjudicator would have no jurisdiction to consider the matter or make an adjudication determination.

39 Indeed, the adjudicator in this case acknowledged that if Taisei had provided its payment response within time, the adjudication application would be premature and liable to be rejected *in limine*. This strict approach is in line with the decision in *Kell & Rigby* as well as local practice (see *Company BW v Company BX* [2006] SGSOP 15, where an adjudication application was rejected pursuant to section 16(2)(a) of the SOP Act for being made after the prescribed period). Among other things, requiring parties to adhere strictly to the timelines prescribed in the SOP Act facilitates the settlement of disputes and ensures that parties have ample time to prepare for the adjudication within the limits of the statutory framework.

40 I therefore considered that the question posed at [37] above should be answered in the affirmative, with the result that it would be open to me to review the adjudication determination to ascertain whether there had been compliance with the timelines prescribed in the SOP Act for the making of Doo Ree's adjudication application. In this regard, I note that in *Fifty Property Investments Pty Ltd v Barry J O'Mara* [2006] NSWSC 428, Brereton J had stated that:

> 18 *Where jurisdiction depends on the existence of a state of facts, a decision maker's finding that the necessary facts to found jurisdiction exist can be reviewed by a court*, notwithstanding that judicial review does not ordinarily extend to errors of fact, as *there is an exception in the case of the "jurisdictional fact" doctrine, under which an erroneous finding of fact, the existence of which is an essential precondition upon which jurisdiction depends, is jurisdictional error, notwithstanding its factual character*. Thus the inherent jurisdiction of superior courts to review decisions on the ground of jurisdictional error includes the power to consider whether there was an absence of jurisdiction because the decision maker made a wrong finding as to the existence

of such an essential precondition…

[emphasis added]

The substantive issue: whether the adjudication application complied with the timelines in the SOP Act

41 As with the preliminary issue, the parties were in agreement on a number of points. The parties agreed that the sub-contract between them was *entirely in writing*, that no other documents had been given by Taisei to Doo Ree after the LOA had been signed and that *all of the provisions in the LOA were binding* on the parties. These included the following:

> **1 Sub-Contract Sum**
>
> The Sub-Contract Sum for Reinforce Concrete (RC) works at Botanic Gardens Station is Singapore Dollars Three Million And Six Hundred Thousand Only (S$3,600,000) excluding GST, as tabulated below and subject to the terms and conditions as stipulated in the sub-contract agreement The contract sum shall be subject to final re-measurement based on as-built drawing and variation orders [*sic*]
>
> **2 Scope of Work**
>
> The Preliminaries and Scope of Work table is enclosed and shall be read in connection with the terms and conditions of this sub-contract.
>
> **8 Discrepancies in Contract document**
>
> A draft copy of the contract document has been forwarded to you and until final execution of the formal contract, this document, the draft copy of the contract document and your offer of 12th October 2006 (ref 61030QTN) shall be binding for both parties. This letter of award and the conditions as stipulated shall take priority over all other documents.

42 It was Taisei's case that the "draft copy of the contract document" referred to in paragraph 8 of the LOA, the "sub-contract agreement" referred to in paragraph 1(a) of the LOA and the "sub-contract" referred to in paragraph 2(b) of the LOA were all references to the draft sub-contract and that paragraph 8 of the LOA had incorporated the contents of the draft sub-contract by reference. Taisei further contended that a copy of the draft sub-contract had been forwarded to Doo Ree before the LOA was signed and that Doo Ree was aware of the terms of the draft sub-contract including Clause 16.3. Alternatively, it was contended that even if Doo Ree had not received the draft sub-contract, it was nevertheless bound by the terms therein, including Clause 16.3.

43 Although Doo Ree agreed with the adjudicator's finding that it was bound by paragraph 8 of the LOA which was clear in its terms, it contended that the draft sub-contract had not been incorporated by reference into the sub-contract between the parties and that Clause 16.3 was therefore not binding. There were three related aspects to this argument. First, while paragraph 8 of the LOA referred to the "draft copy of the contract document", it was not clear that this document was the draft sub-contract; secondly, Doo Ree had never been given a copy of the draft sub-contract as alleged by Taisei; thirdly, flowing from the aforementioned fact, it was established law that a document that was described as being annexed to a written contract but which was not so annexed was not and could not be incorporated as part of that contract.

First sub-issue: whether the words used in paragraph 8 of the LOA were sufficient to incorporate the draft sub-contract by reference

44 In his first affidavit, Mr Lee described how he had instructed Taisei's quantity surveyors to prepare the draft sub-contract sometime in 2006. Upon his having reviewed the draft sub-contract, he had instructed Mr Uh Chee Yuan ("Mr Uh"), one of Taisei's quantity surveyors involved in discussions with Doo Ree, to forward a copy of the draft sub-contract to Doo Ree. Mr Lee was later told by Mr Uh that he had given a copy of the draft sub-contract by hand to Doo Ree's representative.

45 Mr Lee explained that when he drafted the LOA subsequently, he specifically drafted paragraph 8 thereof to record that the draft sub-contract, which he referred to as the "draft copy of the contract document", had been forwarded to Doo Ree and that the document was binding on the parties. Mr Lee also said that he was referring to the draft sub-contract when he used the term "sub-contract agreement" in paragraph 1(a) of the LOA and the term "sub-contract" in paragraph 2(b) of the LOA.

46 Counsel for Doo Ree submitted that I should not have regard to Mr Lee's evidence as this had not been placed before the adjudicator and was, in any event, vague. Counsel also sought to argue that Taisei had given vague explanations to the adjudicator as to what the reference to the "draft copy of the contract document" in paragraph 8 of the LOA was meant to incorporate. Further, counsel also sought to rely on the case of *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2000] 4 SLR 441 ("*L & M Concrete Specialists*") to argue that the words used in paragraph 8 of the LOA were insufficient to incorporate the draft sub-contract because the name of the draft sub-contract was not used in paragraph 8 of the LOA.

The court's findings in relation to the first sub-issue

47 Having considered the submissions made by both parties, I found that the words used in paragraph 8 of the LOA were sufficient to incorporate the draft sub-contract by reference.

48 Although Mr Lee's evidence was not placed before the adjudicator, I was of the view that this did not preclude Taisei from raising such evidence in the present proceedings. This is because Order 95 rule 3(1) of the Rules of Court provides for the filing of an affidavit in support of an application such as the present which must, *inter alia*, set out the evidence relied on by the applicant. This affidavit must be served on the party opposing the application and Order 95 rule 3(4) allows that party to also file an affidavit. Such an affidavit can contain the necessary evidence in support of its own case and it should be noted that some of the evidence adduced by Doo Ree had also not been raised in the adjudication. Given the very short timelines prescribed by the SOP Act for the adjudication process and in the absence of any legal requirement that parties' arguments and evidence on an application to set aside be restricted to only what was before an adjudicator, I was not inclined to exclude Mr Lee's evidence solely on the basis that it had not been used in the adjudication. However, one caveat may be added to what has been stated above: if parties adduce evidence on an application to set aside that is materially inconsistent with or materially contradicts what was placed before an adjudicator, this may adversely affect their own position in the application to set aside.

49 The material aspects of Mr Lee's evidence showed that the reference to the "draft copy of the contract document" in paragraph 8 of the LOA was a reference to a copy of the draft sub-contract and that the draft sub-contract had been the only such document prepared by Taisei for the Botanic Gardens Station project. The draft sub-contract matched the description of a "contract document"

used in paragraph 8 of the LOA. Doo Ree did not adduce any evidence to challenge this aspect of Mr Lee's evidence. In addition, Doo Ree, having expressly agreed that a "draft copy of the contract document" had been forwarded to it and that this document was binding, could not point to any alternative document that that might have fitted the description.

50 That said, I did not accept the submissions made by counsel for Taisei that there were other alleged references to the draft sub-contract in the LOA, even allowing for the fact that the LOA does not appear to have been drafted with the benefit of legal advice. I was of the view that the phrases "the sub-contract agreement" and "this sub-contract" in paragraphs 1(a) and 2(b) of the LOA, respectively, were ambiguous as to whether they referred to the LOA itself (which the parties agreed reflected the sub-contract between them) or to a separate document. In any case, Mr Lee did not offer any explanation as to why the same document (i.e. the draft sub-contract) was referred to by three different names in the LOA.

51 Further, I agreed with counsel for Taisei that there was no requirement for there to be an exact match between the description used in a document (A) to refer to a second document (B), on the one hand, and the actual name of the second document (B), on the other, before the second document (B) could be incorporated in the first document (A). In *Smith and another v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 ("*Smith*"), the House of Lords considered that the reference in a purchase order issued by the respondents to their "General Conditions of Contract 24001, obtainable on request" was sufficient to incorporate the provisions in the respondents' "General Conditions of Contract (24001) Revised March 1970", notwithstanding that it had emerged in evidence that there were in fact *three* different versions of the said conditions (the other two being the original "General Conditions of Contract (24001) and the "General Conditions of Contract (24001) Revised January 1969").

52 The appellants never requested for a copy of the document referred to in the purchase order and Lord Keith of Kinkel, with whom most of the other Law Lords agreed, described as "ill-founded" an argument made by the appellants to the House of Lords to the effect that since it was uncertain which of the three versions would have been sent to the appellants if they had made such a request, it had not been proved that any of the versions had in fact been incorporated into the contract. He held that the "General Conditions of Contract 24001" were incorporated into the contract went on to hold that, viewed objectively, this was a reference to the 1970 version, noting that if the appellants had asked for a copy, it would have been the current version (i.e. the 1970 version) that would have been supplied. He further considered that even if the reference in the purchase order had simply been to "General Conditions of Contract" without more, the 1970 version would still have been incorporated.

53 Finally, I found *L & M Concrete Specialists* to be distinguishable from the facts before me. In that case, the plaintiff sought a stay in respect of the defendant's counterclaim, pursuant to section 7 of the Arbitration Act. The parties had signed a letter of award which made reference to another document called the 'Standard Conditions of Subcontract' which was not given to the defendant. The arbitration clause that the plaintiff sought to rely on was found in the plaintiff's standard form contract called the 'Standard Sub-Contract (Domestic) For Labour and Materials' which was also not signed by the defendant. The plaintiff's application for a stay was dismissed by an assistant registrar. On appeal, one of the main issues that the High Court had to consider was whether the arbitration clause in the standard form contract had been incorporated into the contract with the defendants. In answering this question in the negative, Choo Han Teck JC (as he then was) stated, at [18] – [19] that:

> 18 … Although nowadays other forms of dispute resolutions are no longer perceived as a threat

to the court's jurisdiction, recourse to the courts remain the default route for anyone seeking to assert his legal rights. Any agreement to change or deviate from this avenue must be explicit, and in my view, *arbitration clauses* like exemption clauses, *must be expressly brought to the attention of the other contracting party*; or as Lord Denning emphasized (in his usual colourful way) in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 170, "In order to give sufficiency of notice, it would need to be printed in red ink with a red hand pointing to it — or something equally startling". The admiralty courts have come to exact the same degree of strictness where arbitration clauses are concerned ...

19 The position of the appellant in the present case before me is, in any event, far weaker than that of the respective parties in the cases cited to me. *Counsel had not satisfied me that the document L & M relied on was the document referred to in the contract*. In this case, the contract (LOA) referred to the "Standard Conditions of Subcontract". The arbitration clause, on the other hand, was in a document called "Standard Sub-Contract (domestic) For Labour and Materials". *There is no evidence before me that these two documents are one and the same*.

[emphasis added]

54 It is apparent from the excerpt above that the main reason why Choo JC found that the arbitration clause had not been incorporated was not the manner in which the document containing the arbitration clause was referred to in the letter of award; rather, it was the special nature of arbitration clauses that required that they be expressly brought to the attention of the other party. Clause 16.3 is not an arbitration clause and certainly cannot be described as one that is unusual or onerous. Another point of distinction between the instant case and *L & M Concrete Specialists* is that there is evidence before the court to show that the reference to the "draft copy of the contract document" was a reference to a copy of the draft sub-contract. Similar evidence appears to have been lacking in *L & M Concrete Specialists* where there was only an assertion by counsel that the documents were the same.

55 In the circumstances, I found that the words used in paragraph 8 of the LOA were sufficient to incorporate the draft sub-contract and accordingly turned to consider the second sub-issue.

Second sub-issue: whether the draft sub-contract had been forwarded to Doo Ree

56 The adjudicator made a finding that the draft sub-contract had not been forwarded to Doo Ree because the "facts which would follow in the ordinary course of business" did not bear out Taisei's contention that the draft sub-contract had been forwarded to Doo Ree. As the adjudicator's reasoning went, if this had been the case, the parties would have expected Doo Ree to sign and return the draft sub-contract to Taisei.

57 Taisei relied on Mr Lee's evidence as summarised above at [44]. In addition, Taisei relied on the fact that Doo Ree had accepted it was entitled to deduct various back-charges from Doo Ree's monthly progress claims comprising *fines or charges imposed for environmental and safety offences*, as well as charges for materials supplied by Taisei to Doo Ree inclusive of an *administrative charge of 15% of the invoiced value of the materials*. Taisei pointed to two other provisions in the draft sub-contract, namely Clauses 13.5 and 18.0 of the Second Schedule to the draft sub-contract, as giving rise to Doo Ree's contractual liability to bear such charges. According to Taisei, acceptance by Doo Ree of the back-charges showed that it was aware of the aforementioned terms therein and it must therefore have received a copy of the draft sub-contract in order to be so aware.

58 Doo Ree asserted, through the affidavit of its Director, Mr Im Byung Wook ("Mr Im"), that Doo

Ree had never received a copy of the draft sub-contract or a "draft contract document" at any time prior to the signing of the LOA. Counsel for Doo Ree pointed to the lack of documentary evidence (such as emails between the parties) making reference to the draft sub-contract. Counsel further suggested that the draft sub-contract was in fact not ready as at the time when the LOA was issued and signed and could not therefore have been forwarded to Doo Ree before the LOA was signed. In relation to the acceptance of the back-charges, Doo Ree contended that the sums had been accepted as they were trivial and also sought to rely on the provisions of the LOA to explain why it had accepted these charges (see below at [66] – [68]).

59 As for why Doo Ree had signed the LOA without modifying paragraph 8 thereof despite its not having received anything from Taisei, this was explained at paragraph 47 of Mr Im's affidavit which describes what happened after he received the draft LOA from Mr Lee:

> After receiving the draft letter of award, I went through those important conditions, namely, man-year entitlement, acceptance of works by LTA, and the administrative charges. *I did not pay much attention to the other provisions*, as I do not think that they would affect our revised price of S$3,600,000 and our profit margin.
>
> [emphasis added]

The court's findings in relation to the second sub-issue

60 Having considered the parties' submissions and the evidence before me, I found that Taisei had established that a copy of the draft sub-contract had been forwarded to Doo Ree before the signing of the LOA and that Doo Ree was aware that this was the "draft copy of the contract document" referred to in paragraph 8 of the LOA.

61 Mr Lee's evidence that a copy of the draft sub-contract had been given to Doo Ree was balanced by Mr Im's evidence that this had never happened. As such, I considered the surrounding facts to ascertain which version was borne out. First, Doo Ree conceded that it could not deny that "draft copy of the contract document" had been forwarded to it and that Doo Ree was bound by its contents by virtue of paragraph 8 of the LOA. In this regard, I agreed with the submission made by counsel for Taisei that Mr Im's evidence as to why he had signed the LOA without modifying paragraph 8 (see [59] above) was inadmissible to contradict the terms of the LOA because the sub-contract between the parties was wholly in writing. Doo Ree's acceptance of paragraph 8 of the LOA was consistent with Mr Lee's version of events and counsel for Doo Ree was unable to refute or suggest an alternative to Mr Lee's explanation as to why paragraph 8 of the LOA made reference to the "draft copy of the contract document" having been forwarded to Doo Ree. Having signed the LOA, Doo Ree could not show that there was any other document that had been forwarded to it which might have been the "draft copy of the contract document" and its silence on this point was conspicuous.

62 Secondly, Doo Ree's own conduct leading up to the signing of the LOA was more consistent with Taisei's version of events. The undisputed evidence showed that Doo Ree had been forwarded a copy of the LOA more than a month before it was signed and Doo Ree had raised specific queries about the other paragraphs of the LOA but not paragraph 8. The inference that arises from these facts is that Doo Ree had no questions concerning paragraph 8 of the LOA which is clear on its face as to its effect in incorporating the "draft copy of the contract document". Doo Ree, having signed the LOA cannot now deny that the document had been forwarded to it or that it is bound by the document, whether it had actually read all of its terms or not.

63 Thirdly, there was no objective evidence to support the bare suggestion that the draft sub-contract was in fact not ready when the LOA was signed. The absence of emails making mention of the draft sub-contract did not, without more, show that it had not been forwarded to Doo Ree. As for the fact that the draft sub-contract was not signed, this did not necessarily mean that it was not ready when the LOA was signed because there was a reasonable explanation for why the draft sub-contract was not signed. The fact of the matter is that Doo Ree chose to sign the LOA which contained an express provision acknowledging that a "*draft* copy of the contract document", being separate and distinct from the LOA, had been forwarded to it and was *pending execution* as a "formal contract".

64 Taisei's explanation as to why the draft sub-contract was not signed and was pending execution was that at the time the LOA was signed, the LTA not yet approved Doo Ree's appointment as sub-contractor, having rejected Doo Ree previously. As Mr Lee stated in his first affidavit, if and when the LTA approved Doo Ree as a sub-contractor, the *draft* sub-contract would be executed as a *formal* sub-contract. Doo Ree must have been aware that the LTA had not formally accepted Doo Ree carrying out the RC works since this was specifically recorded in paragraph 7 of the LOA (see [68] below) and also in the last sentence of the LOA which stated:

> By signing this document, the sub-contractor fully understands the implications of carrying out works *without the formal acceptance of the Employer LTA*.
>
> [emphasis added]

65 In the circumstances, I was of the view that there was no inconsistency between Taisei's assertion that the draft sub-contract had been handed over to Doo Ree and the fact that this had not been signed by Doo Ree. Neither party adduced any evidence to show whether it was common or uncommon in industy practice for draft contractual documents such as the draft sub-contract to be signed by parties pending formal execution and on the evidence before me, I was satisfied that the fact of the draft sub-contract not having been signed did not make Taisei's claim that the draft sub-contract was handed over to Doo Ree less believable. I was thus of the view that the fact that the draft sub-contract was not signed by Doo Ree did not have the significance placed on it by the adjudicator.

66 Finally, I found Doo Ree's conduct in accepting liability for various back-charges following the signing of the LOA to be of significance. During the adjudication proceedings, Doo Ree admitted to liability for certain charges for safety violations and the value of materials supplied by Taisei, inclusive of the administrative charge of 15% of the value of the materials. Doo Ree's explanation for this concession in the adjudication was that these charges had been accepted because the amounts were not substantial and it did not wish to waste time disputing such "trivial matters". While this might have been a plausible explanation on its own, Doo Ree was unable to satisfactorily account for having accepted other charges during the period when it was performing work for Taisei.

67 Counsel for Taisei referred to various payment certificates issued by Taisei to Doo Ree at for the Botanic Gardens Station project from June 2007 to August 2008 which reflected Taisei as having, on multiple occasions, deducted charges for safety violations and the value of materials inclusive of the aforementioned 15% administrative charge over the value of materials supplied by Taisei to Doo Ree within this period. These were not disputed by counsel for Doo Ree who tried to justify Doo Ree's acceptance of the 15% administrative charge by reference to paragraph 7(c) of the LOA which also mentioned the imposition of an administrative charge of 15%.

68 However, a plain reading of paragraph 7(c) and the paragraphs of the LOA immediately

preceding it clearly indicated that the 15% administrative charge mentioned therein was *not* related to the *supply of materials*:

> **7 Acceptance of Works by LTA**
>
> You are to perform your works with competent supervision and good workmanship and shall at all time maintain good performance to the satisfaction and approval of LTA In the event of a rejection by LTA to admit you to the list of approved sub-contractor, the main contractor shall reserve the rights to terminate your contract and a reasonable rate of compensation shall be made to finalize all accounts with you based on the contract conditions as stipulated hereinunder: [*sic*]
>
> (a) In the event of rejection of works and approval has not been granted for concreting, the main Contractor reserves the right to engage others to complete the portion so involved until satisfactory completion. Such sums as to be incurred shall be off-set against the quantum of works in progress and any amount due to you.
>
> (b) Any other works in progress shall be treated in a similar manner to derive at the value of works in progress for the basis of valuation.
>
> (c) An administrative charge of 15% shall be levied on the amount incurred under sub-clause (a) and (b).

Doo Ree was therefore unable to provide a convincing explanation for having agreed to bear these charges and its acceptance of the same supported Taisei's contention that Doo Ree had received a copy of the draft sub-contract and was aware of its terms.

Third sub-issue: whether the draft sub-contract could be incorporated by reference even if a copy had not been forwarded to Doo Ree

69 While my findings above that paragraph 8 of the LOA referred to the draft sub-contract and that a copy of the draft sub-contract had been forwarded to Doo Ree would have been sufficient to deal with the substantive issue in these proceedings, I also considered whether the terms of the draft sub-contract, including Clause 16.3, would have been incorporated by reference even if a copy of the draft sub-contract had not been forwarded to Doo Ree.

70 It was Taisei's contention, relying mainly on *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712 ("*Press Automation*") and a number of other authorities including *Smith*, that even if a copy of the draft sub-contract had not been given to Doo Ree (which Taisei denied), Doo Ree would nevertheless have been bound by the terms therein because the draft sub-contract was incorporated by reference in the LOA.

71 Doo Ree's submissions on the third sub-issue essentially boiled down to the proposition that if parties to a contract sign document X which states that the parties are bound by document Y, document Y will only be binding if it is given by the party from which it originates to the other party. Doo Ree sought to rely on the case of *Shia Kian Eng (trading as Forest Contractors) v Nakano Singapore (Pte) Ltd* [2001] SGHC 68 ("*Shia Kian Eng*") as having laid down this proposition.

72 Having found that the draft sub-contract had not been given to Doo Ree, the adjudicator found *Press Automation* not to be applicable to the instant case, holding that the reference to the "draft copy of the contract document" in paragraph 8 of the LOA was not a reference to a "standard

document similarly incorporated by reference in previous contracts between the parties".

The court's findings in relation to the third sub-issue

73 Having considered the submissions of the parties, I agreed with Taisei that even if the draft sub-contract had not been forwarded to Doo Ree, Doo Ree was nevertheless bound by the terms therein as these had been incorporated by reference. In doing so, I found *Press Automation* to be applicable to the case at hand and *Shia Kian Eng* to be distinguishable.

74 In *Press Automation*, the plaintiff contracted with the defendant (who was in the business of freight forwarding) to transport one of its machines to an exhibition in Bangkok. The defendant had given the plaintiff quotations for its services. The quotations were accompanied by a document called a 'Confirmation of Acceptance' ("CoA") which stated that business was transacted in accordance with the Singapore Freight Forwarders Association Standard Trading Conditions ("the SFFA Conditions"), that a copy of the SFFA Conditions was available upon application and that use of the defendant's services implied acknowledgement and acceptance of the SFFA Conditions. The plaintiff eventually engaged the defendant by signing on the CoA accompanying one of the quotations, but never asked for the SFFA Conditions. The SFFA Conditions were never supplied to the plaintiff during the negotiations. The machine was later damaged while in the defendant's custody and the plaintiff commenced proceedings against the defendant. The defendant sought to rely on two clauses in the Conditions limiting its liability and imposing a time bar.

75 It appears from *Press Automation* that the plaintiff had conceded that by signing the CoA, it was bound by all but the two disputed clauses the SFFA Conditions even if these had not been read (the plaintiff's main dispute in relation to incorporation by reference was thus that the incorporating clause was insufficient to incorporate the two disputed clauses on the basis that they were particularly unusual or onerous and involved the abrogation of a statutory right). Nevertheless, Judith Prakash J, apart from considering whether the two disputed clauses were incorporated, also dealt with the more general issue of whether the terms in the SFFA Conditions, which was a *separate document* that was *not signed by* and *not given to* the plaintiff, could be incorporated by reference. After considering various authorities local, English and Canadian authorities, Prakash J held, at [39] – [40], that:

> 39 Having considered the authorities, I am of the opinion that the fact that the incorporating clause here was contained in a document that was signed by Patec, resulted in the conditions being incorporated as part of the contract between the parties notwithstanding that Patec did not have a copy of them and had not read them. I hold that the conditions were incorporated as a whole and that the line of authorities that decides that onerous and unusual conditions cannot be incorporated unless the attention of the party sought to be bound has been specifically drawn to them does not apply to a case like this where there is a signed contract with an explicit incorporating clause…
>
> 40 …Where a party has signed a contract after having been given notice, by way of a clear incorporating clause such as the one used in the present case, of what would be included among the contractual terms, that party cannot afterwards assert that it is not bound by some of the terms on the ground that the same are onerous and unusual and had not been drawn specifically to its attention. Contracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it. If they do not do so, they will be bound by those terms except to the extent that the UCTA offers them relief.

76 In the instant case, Doo Ree having signed the LOA and having agreed to be bound by the

terms of the "draft copy of the contract document" which is in fact the draft sub-contract, cannot now be heard to say that the draft sub-contract was not incorporated just because it did not receive a copy of the same. If Doo Ree had not in fact received the "draft copy of the contract document", the onus was on Doo Ree to have asked Taisei for it or, alternatively, to object to paragraph 8 of the LOA. Doo Ree did neither and cannot now claim ignorance of the terms in the draft sub-contract. *Press Automation* shows that even onerous and unusual terms in a separate document that is not specifically shown to a contracting party can be incorporated by reference into a *written* contract except to the extent that the Unfair Contract Terms Act (Cap 396) applies, much less a term like Clause 16.3 which can by no stretch of the imagination be described as onerous or unusual. Mr Im's explanation as to why he had agreed to paragraph 8 of the LOA (see [59] above) is precisely an example of the type of conduct that, according to *Press Automation*, will provide no relief to contracting parties.

77 Insofar as the adjudicator found *Press Automation* to be inapplicable on the basis that the "draft copy of the contract document" in paragraph 8 of the LOA was not a "*standard document* similarly incorporated by reference in *previous contracts* between the parties", I am of the view that he had unjustifiably limited the ambit of Prakash J's pronouncements. For one thing, a previous course of dealing is not a prerequisite for incorporation by reference; the parties in *Press Automation* had never contracted prior to the engagement that sparked the litigation (see *Press Automation* at [10]). In addition, it is unclear what the adjudicator meant by referring to a "standard document". What is regarded as 'standard' between parties to a contract would necessarily vary according to the facts of each case. For instance, a set of conditions that is used by a grouping or body of entities (e.g. the SFFA) in conducting business might be described as that grouping's 'standard' conditions but for a counterparty from a completely different industry (e.g. the plaintiffs in *Press Automation*), whether the conditions are called 'standard' or not makes no difference to that counterparty if it does not ask for and does not see what is contained in these conditions. Even where contracting parties are from the same industry, one party might choose to incorporate its *own* 'standard' conditions which might well be different from the other party's 'standard' conditions. At the end of the day, *Press Automation* shows that parties entering into written contracts bear the responsibility of ascertaining what they are agreeing to incorporate, especially where what is sought to be incorporated is found in a separate document.

78 As for *Shia Kian Eng*, which was also decided by Prakash J, the facts therein were somewhat different from those in the instant case. That case involved a dispute arising out of certain sub-contracts entered into between the defendants, a main contractor, and the plaintiff, a sub-contractor. One of the issues that Prakash J had to determine at the outset of the case was the form that the sub-contracts took. She made a finding that the sub-contracts between the disputing parties were partially oral and partially in writing. The written portion of the sub-contracts, purchase orders issued by the defendants to the plaintiff, had stated that various documents were annexed to the purchase orders. The documents were not so annexed and were not given to the plaintiff before he signed the purchase orders. Prakash J held that these documents were not incorporated as part of the contract and further stated, at [18], that, "It is difficult to incorporate as part of a contract documents which are not furnished (and not simply shown) by one party to the other party to or at the time of signing of the contract unless there is a clear indication by that other party that he would accept documents subsequently given as part of the contract." It is this statement that counsel for Doo Ree sought to place reliance on.

79 I agreed with submissions made by counsel for Taisei that the issue in *Shia Kian Eng* turned on the evidence of the plaintiff that he had signed the purchase orders, which were only issued after work had commenced, purely for the defendants' administrative purposes in order that he could be paid. This evidence was ruled to be admissible for the purpose of determining whether the contracts

were wholly in writing or not. It is not disputed in this case that the sub-contract between Taisei and Doo Ree was wholly in writing and thus different considerations would apply here. Doo Ree must be taken to have signed the LOA with its eyes open.

Conclusion on the substantive issue

80 Following from the court's conclusions on the three sub-issues, I hold that the terms of the draft sub-contract, including Clause 16.3, had been incorporated by reference into the sub-contract between the parties and Clause 16.3 was therefore binding on Doo Ree.

81 Accordingly, based on section 11(1)(a) of the SOP Act, Taisei had 21 days from the service of Doo Ree's payment claim on 29 November 2008 to provide a payment response, which it did on 20 December 2008. Doo Ree would thus have been entitled to make an adjudication application only after the dispute settlement period (see [17] above) and it follows from this that *the adjudication application of 19 December 2008 was premature and not made in accordance with section 13(3)(a) of the SOP Act*. The adjudicator ought to have rejected the adjudication application pursuant to section 16(2)(a) of the SOP Act and consequently, had no jurisdiction to make the adjudication determination that he did.

Conclusion

82 For the reasons set out above, I was of the view that the adjudication determination was void because of the adjudicator's lack of jurisdiction.

83 In *Chip Hup Hup Kee*, the court suggested (at [27]), without a firm view being expressed, there might be discretion to refuse to set aside an adjudication determination even where the technical grounds for doing so have been met, where such setting aside would merely result in a re-hearing by the adjudicator who would simply reach the same decision as before. As in *Chip Hup Hup Kee*, this point was not argued before me and I likewise express no firm view on whether such discretion exists. Suffice to say that even if it did, I had doubts about whether the same result would be reached if the matter went before an adjudicator again. One consequence flowing from the erroneous finding by the adjudicator that Clause 16.3 was not incorporated was that he treated Taisei's payment response as late; following *Chip Hup Hup Kee*, he accordingly did not consider Taisei's reasons for withholding payment in making his adjudication determination. It cannot therefore be predicted what the result would be if Taisei's reasons for withholding payment were placed before an adjudicator alongside Doo Ree's claims.

84 I therefore allowed the application and ordered that the adjudication determination be set aside.